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In the Supreme Court of the United States

OCTOBER TERM, 1978

DUFFY J. LAFONT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

DAVID L. LEVY, PETITIONER

v.

UNITED STATES OF AMERICA

VINCENT R. PERRIN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Perrin Pet. App. A) is reported at 580 F. 2d 730.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1978. A petition for rehearing was denied on November 15, 1978. The petition for a writ of certiorari in No. 78-959 was filed on December 15, 1978, in No. 78-5855 on December 11, 1978, and in No. 78-5930 on December 12, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether commercial bribery in violation of state law is encompassed within the proscription of the Travel Act, 18 U.S.C. 1952.
2. Whether there was sufficient evidence to support petitioner Perrin's conviction.
3. Whether the district court properly denied petitioner Perrin's severance motion.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners were convicted of conspiring and of using the facilities of interstate commerce with the intent to promote a commercial bribery scheme illegal under state law, in violation of 18 U.S.C. 1952 and 371. Petitioner Perrin received concurrent one-year suspended sentences on the conspiracy count and two substantive counts. Petitioners LaFont and Levy were sentenced to concurrent two-year terms of imprisonment on the conspiracy count and four substantive counts. The court of appeals affirmed, one judge dissenting (Perrin Pet. App. A; 580 F. 2d 730).

As summarized by the court of appeals, the evidence at trial showed that petitioner LaFont approached Roger Willis, an employee of the Petty-Ray Geophysical Company, and proposed that Willis steal certain exploration charts from his employer. Willis was to receive a

percentage of the profits of a corporation organized by petitioners Levy and LaFont to exploit the stolen data. In furtherance of this scheme, petitioner Perrin, a consulting geologist, was to interpret and analyze the data stolen from Petty-Ray. Petitioners used the facilities of interstate commerce in furtherance of the commercial bribery scheme by placing interstate telephone calls to secure materials needed to analyze the stolen exploration charts. Commercial bribery of an employee of a business firm is illegal under Louisiana law (La. Rev. Stat. Ann. § 14: 73 (West 1974)). (See Perrin Pet. App. A-5 to A-6, A-12 to A-13, A-15.)

DISCUSSION

1. Petitioners contend (Perrin Pet. 6-8; LaFont Pet. 4-7; Levy Pet. 4-7) that the court of appeals erred in holding that the Travel Act's reference to "bribery" encompasses commercial bribery illegal under state law, and that the decision below conflicts with the decision of the Court of Appeals for the Second Circuit in *United States v. Brecht*, 540 F. 2d 45 (1976). Although we believe that the court of appeals correctly rejected petitioners' contention, we recognize that a direct conflict among the circuits exists on this significant issue of statutory construction and thus do not oppose the petitions for certiorari on this issue.

The federal Travel Act, 18 U.S.C. 1952, prohibits the use of any facility of interstate commerce to promote or carry on any of certain specified unlawful activities, including "bribery" in violation of the law of the state in which it is committed. In *United States v. Pomponio*, 511 F. 2d 953 (4th Cir.), cert. denied, 423 U.S. 874 (1975), the Fourth Circuit interpreted this language at face value, concluding that the statute covers commercial bribery

as well as bribery of public officials.¹ Thus, the court held that the Act extended to defendants' bribery of a bank officer to influence his approval of certain loans.

In *United States v. Brecht*, 540 F. 2d 45 (1976), the Second Circuit disagreed with *Pomponio*, holding that commercial bribery could not serve as the basis for a Travel Act violation. The Second Circuit reasoned that commercial bribery "typically is not a feature of organized crime and was not subsumed under the traditional offense of bribery." *Id.* at 50. On this ground, the Second Circuit set aside convictions based on commercial bribery illegal under New York law.²

The decision of the court of appeals in the present case holds that commercial bribery illegal under state law is encompassed within the federal Travel Act; it thus conflicts with the Second Circuit's holding in *Brecht*. The court below reasoned that commercial bribery could not be excluded from the Act's coverage simply because it is not "typically associated with the underworld." Such a requirement would be tantamount to implying an additional element of the statutory offense, contrary to this Court's teaching in *United States v. Culbert*, 435 U.S. 371 (1978). The court of appeals therefore concluded that the literal terms of the statute were properly applied to commercial bribery. The term "bribery" was thus

¹ *Pomponio* sustained the defendants' convictions based on interstate travel in furtherance of a commercial bribery scheme illegal under New York law and under a federal statute (18 U.S.C. 215) applicable to federally insured financial institutions.

² Following the Second Circuit's decision in *Brecht*, the defendants in *Pomponio* sought vacation of their sentences, which was denied. This Court subsequently denied review. See *Pomponio v. United States*, 430 U.S. 966 (1977); *Piluso v. United States*, No. 78-279 (Nov. 27, 1978). The government opposed certiorari in those cases because there was not yet a genuine conflict among the circuits. The *Pomponio* convictions rested on violations of federal as well as state commercial bribery statutes, while the *Brecht* convictions rested solely on state law commercial bribery violations.

construed in its generic sense rather than in a strict common law sense, an approach approved in *United States v. Nardello*, 393 U.S. 286, 289, 296 (1969). (Perrin Pet. App. A-8 to A-11).

While there have been relatively few Travel Act prosecutions in the past involving violations of state commercial bribery statutes, several such prosecutions have recently been brought, and other cases are under investigation. The question is thus one of significant practical impact in the administration of the statute. Accordingly, while we believe that the decision of the Fifth Circuit is correct under *Nardello* and *Culbert*, we do not oppose the granting of petitions for certiorari to resolve the conflict between the Fifth and Second Circuits.

2. Petitioner Perrin also contends (Pet. 8-9) that the evidence was insufficient to sustain his conviction. However, as the court of appeals pointed out (Perrin Pet. App. A-6), petitioner did not challenge the sufficiency of the evidence on appeal, and that question was not decided by the court below. The question is therefore not appropriately raised in this Court. See *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977).

In any event, the evidence, viewed in the light most favorable to the government (*Burks v. United States*, No. 76-6528 (June 14, 1978), slip op. 15-16; *Glasser v. United State*, 315 U.S. 60, 80 (1942)), was sufficient to establish petitioner's guilt. The evidence showed that petitioner served as a consulting geologist in the illegal scheme. It was his job to interpret the stolen geological data. Petitioner Perrin caused Willis to call an out-of-state supplier in order to purchase materials needed to analyze the stolen data. He selected an out-of-state source for these materials believing that a distant supplier would be less likely to notice the illegal exploration activities of the conspirators (Perrin Pet. App. A-12, A-15).

3. Petitioner Perrin's claim (Pet. 9-10) that he was entitled to a severance because he was not a conspirator and because his defense was antagonistic to that of his co-defendants is equally unsupported. The evidence regarding Perrin's participation in the conspiracy was substantial, and, as noted, above, he did not challenge the sufficiency of that evidence in the court below. Moreover, Perrin does not specify how his defense strategy was inconsistent with that of his co-defendants, and he made no such showing in the lower courts (Perrin Pet. App. A-18). Perrin proffered no evidence at trial that was excluded due to the joinder of his co-defendants (*ibid*), and he has shown no prejudice from the joinder. This fact-bound claim does not merit review by this Court.

CONCLUSION

The petitions for a writ of certiorari should be granted, limited to the question whether the Travel Act encompasses commercial bribery in violation of state law.

Respectfully submitted,

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